

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000470-001 DT

07/16/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

SIERRA CLUB - GRAND CANYON CHAPTER TIMOTHY M HOGAN

v.

ARIZONA CORPORATION COMMISSION JANET F WAGNER
(001)

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

The Sierra Club–Grand Canyon Chapter asks this Court to review Decision No. 73252 issued by the Arizona Corporation Commission. For the following reasons, this Court vacates that Decision.

I. FACTUAL BACKGROUND.

On November 5, 2010, Mohave Electric Cooperative, Inc. (MEC), filed an application with Defendant-Appellee, the Arizona Corporation Commission (AzCC) for approval of a waste-to-energy (WTE) facility as a pilot program under the renewable energy rules, or in the alternative, a limited waiver. The plan was to incinerate municipal solid waste (MSW) as an energy source. On January 13, 2011, Plaintiff-Appellant the Sierra Club–Grand Canyon Chapter (SCGCC), filed an application to intervene. On January 25, 2011, the AzCC granted that request. On May 10, 2011, the staff of AzCC's utilities division files a memorandum and proposed order, and SCGCC filed exceptions.

On July 12, 2011, the AzCC held an open meeting to consider the proposed order and certain amendments. The AzCC held an evidentiary hearing over 2 days, but limited witness testimony to 10 minutes per witness. At the conclusion of that process, the AzCC approved MEC's application and issued Decision No. 72500.

On August 12, 2011, SCGCC filed an application for rehearing, which the AzCC granted. An Administrative Law Judge held a hearing on November 29 and 30, and December 1, 2011, and on May 29, 2012, issued a recommended opinion and order. On June 7, 2012, the SCGCC filed exceptions to that recommended order.

On June 26, 2012, the AzCC issued Decision No. 73252, which affirmed AzCC's previous approval of MEC's application in Decision No. 72500. On July 16, 2012, the SCGCC filed an application for rehearing, which was denied by operation of law on August 6, 2012. On September 4, 2012, SCGCC filed a Complaint for judicial review of the administrative decision. This Court has jurisdiction pursuant to A.R.S. § 12–124(A) and A.R.S. § 12–905(A).

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II. GENERAL STANDARDS FOR REVIEW.

The Arizona statutory authority and case law define the scope of administrative review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E).

The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (cites omitted).

[I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dent. Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984).

[The reviewing court must] view the evidence in a light most favorable to upholding the Board's decision and "will affirm that decision if it is supported by any reasonable interpretation of the record."

Baca v. Arizona D.E.S., 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998) (cites omitted).

A question of statutory interpretation involves a question of law, and [the reviewing court] is not bound by the trial court's or the agency's conclusions [about] questions of law.

Siegel v. Arizona St. Liq. Bd., 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991).

On appeal, [the reviewing court] is free to draw its own conclusions in determining if the Board properly interpreted the law; however, the Board's interpretation of statutes and . . . regulations is entitled to great weight.

Baca, 191 Ariz. at 45-46, 951 P.2d at 1237-38.

Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight. However, the agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction.

U.S. Parking Sys. v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989) (cites omitted).

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III. ISSUE: WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ACTION OF THE AGENCY, AND WAS THE ACTION OF THE AGENCY CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

SCGCC asks this Court to vacate AzCC Decision No. 73252, or in the alternative, reverse that Decision. SCGCC contends the following: (1) The AzCC rules do not allow MSW as an eligible renewable energy resource; (2a) the Renewable Energy Standard Rules (RESR) do not permit a pilot program for waste-to-energy facilities; (2b) The Reclamation Power Group (RPG) facility does not qualify for a waiver from the RESR requirements; and (3) there was no credible evidence to support the determination that 90% of the electricity from the proposed facility would come from biogenic sources. SCGCC has provided to this Court authorities and arguments in support of its position.

AzCC asks this Court to affirm AzCC Decision No. 73252. AzCC contends the following: (1) The AzCC Decision is entitled to deference; (2) this Action should be dismissed for lack of subject matter jurisdiction; (3) the AzCC's factual determinations are entitled to deference; (4) the AzCC's legal determinations for its own rules and regulations are entitled to deference; (5) SCGCC does not have standing to bring this action; (6a) the MEC/RPG facility qualifies as a pilot program; (6b) the MEC/RPG facility qualifies under a waiver; (6c) the AzCC correctly determined 90% of the energy produced from the MEC/RPG facility would come from renewable sources; and (7) if the AzCC did err in concluding 90% of the energy produced from the MEC/RPG facility would come from renewable sources, it was only because 100% of the energy produced from the MEC/RPG facility would come from renewable sources. AzCC has provided to this Court authorities and arguments in support of its position.

This Court concludes the authorities and arguments provided by SCGCC are well-taken, and this Court adopts those authorities and arguments in support of its decision.

IV. CONCLUSION.

Based on the foregoing, this Court concludes the AzCC erred and abused its discretion in adopting Decision No. 73252. This Court further concludes SCGCC is entitled to attorney's fees and costs.

IT IS THEREFORE ORDERED vacating AzCC Decision No. 73252.

IT IS FURTHER ORDERED, if SCGCC would like this Court to award attorneys' fees and costs, by **August 6, 2013**, SCGCC shall submit the necessary request and supporting documentation.

IT IS FURTHER ORDERED, by **August 6, 2013**, SCGCC shall submit to this Court a proposed form of judgment.

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